



AlaFile E-Notice

28-CV-2009-900101.00

Judge: DAVID A RAINS

To: MCDONALD JOHN F III
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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF DeKALB COUNTY, ALABAMA

**JIM L. RIDLING AS COMMISSIONER OF INSURANCE v. MOUNTAIN VIEW MEMORY GARDENS &
MAVS OF ALA INC**
28-CV-2009-900101.00

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**Jim L. Ridling, in his official capacity
as Commissioner of Insurance for
the State of Alabama,,
PLAINTIFF**

vs.

**Mountain View Memory Gardens &
Mausoleum, Inc., an Alabama
Corporation,
DEFENDANT**

**IN THE CIRCUIT COURT OF
DEKALB COUNTY, ALABAMA
CASE NO. – CV-2009-900101**

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PRELIMINARY INJUNCTION

Before the Court is the verified Complaint of Jim L Ridling, in his official capacity as Commissioner of Insurance of the State of Alabama, for a preliminary injunction against Defendant Mountain View Memory Gardens & Mausoleum, Inc., which will have the effect of placing the Defendant in receivership as authorized by the Alabama Preneed Funeral and Cemetery Act, Code §§ 27-17A -1 *et seq.*, and other relevant portions of the Alabama Insurance Code, mainly ALA CODE §§ 27-32-1 *et seq.*

Appearing in open court on June 19, 2009, were J. Fairley McDonald, III, Assistant Attorney General and associate counsel with the Alabama Department of Insurance on behalf of Ridling, and J. David Dodd, counsel for Lynda Kohn and June McCormick in their capacity as co-executors and residual heirs of the estate of Jeanette Mince, deceased.

Defendant Mountain View Memory Gardens & Mausoleum, Inc., an Alabama corporation, owns and has operated Mountain View Memory Gardens cemetery located in or near Rainsville, DeKalb County, Alabama. The Court has been provided with the verified Answer and Waiver executed by Kohn and McCormick, which provides that, at the time of her death in November, 2008, Jeanette Mince was the sole stockholder, officer, and director of

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Defendant Mountain View Memory Gardens & Mausoleum, Inc.; that, under her will as admitted to probate by the Probate Court of DeKalb County in March, 2009, in that court's case 2009-54, Mince's Interest in the corporate stock would pass as part of her residual estate to Kohn and McCormick, Mince's daughters; and that Kohn and McCormick have expressed the intent to renounce and disclaim any right of succession to the corporate stock, or the property of said corporation. Ridling, as Commissioner of Insurance, has determined that these representations made by Kohn and McCormick are true and correct to the best of Ridling's knowledge, information, and belief.

Under the premises, Kohn and McCormick, in their capacities as executors and residual heirs of the Mince estate, appear to be proper representatives of Mountain View Memory Gardens & Mausoleum, Inc., a corporation, for purposes of this case. Through Kohn and McCormick as its representatives, Mountain View Memory Gardens & Mausoleum, Inc., has waived service of a summons, has consented to this Court's exercise of jurisdiction, has admitted the material averments of the verified Complaint, and has consented to entry of a preliminary injunction as requested by the Commissioner of Insurance and to receivership of Mountain View Memory Gardens & Mausoleum, Inc.

The verified Complaint alleges that Defendant Mountain View Memory Gardens & Mausoleum, Inc., as owner and operator of Mountain View Memory Gardens cemetery in or near Rainsville, DeKalb County, Alabama, has violated the Alabama Preneed Funeral and Cemetery Act, A L A CODE §§27-17A-1 *et seq.*, in various respects, with the results that certain funds required to be deposited in trust have not been so deposited, the corporation's operations are insolvent, the corporation has ceased doing business, and the

cemetery has effectively been abandoned. Ridling, as Commissioner of Insurance, requests appointment of a receiver for Mountain View Memory Gardens & Mausoleum, Inc., as authorized under the Alabama Preneed Funeral and Cemetery Act, A L A CODE §§27-17A-1 *et seq.*, and under A L A CODE §§27-32-1 *et seq.*

Having considered the verified Complaint and the waiver, answer, and consent of the Mountain View Memory Gardens & Mausoleum, Inc., the Court finds as follows for purposes of this Injunction.

1. Ridling is Commissioner of the Alabama Department of Insurance. Pursuant to ALA CODE §27-2-7(2), as Commissioner, Ridling is authorized to enforce the provisions of the Alabama Insurance Code [Ala. Code Tit. 27], including the Alabama Preneed Funeral and Cemetery Act, ALA. CODE §§ 27-17A-1 *et seq.* [the "Preneed Act"]. ALA. CODE § 27-2-7(7) authorizes Ridling to invoke any legal, equitable, or special remedy to enforce the Insurance Code.

2. The Court has subject matter jurisdiction over this action pursuant to ALA. CODE §§ 27-17A-17 and 27-32-3 and personal jurisdiction over Defendant Mountain View Memory Gardens & Mausoleum, Inc., under the waiver, answer, and consent. Venue of this action is proper in De Kalb County, Alabama.

3. This Court finds that, at a trial on the merits, it is substantially likely Ridling will be able to prove:

(a) Mountain View Memory Gardens & Mausoleum, Inc. has violated the Preneed Act by failing to deposit approximately \$52,000 into a merchandise and services trust and approximately \$12,000 into a cemetery endowment care trust as

required under ALA. CODE §§ 27-17A-42 and -49, respectively;

(b) Upon expiration of its preneed certificate of authority by non-renewal, effective June 1, 2009, Mountain View Memory Gardens & Mausoleum, Inc., became inactive for purposes of the Preneed Act and was then required to collect and deposit into trust all funds paid toward preneed contracts sold prior to becoming active. ALA CODE §§ 27-17A-16(a), -(b);

(c) Mountain View Memory Gardens & Mausoleum, Inc. does not have the funds n a r y to make the required deposits to its cemetery merchandise and services trust and endowment care trust#, either under the strict trusting requirements of ALA CODE §§ 27-17A-42 and -49, or in the higher amount required by ALA CODE §§ 27-17A-16(a), -(b);

(d) Mountain View Memory Gardens & Mausoleum, Inc., does not have cash flow sufficient to fund its business operations, to pay its debts and bills as same become due in the regular and ordinary course of business, to furnish cemetery merchandise paid for on an at-need basis, or to furnish at future times paid-for cemetery merchandise and services described in numerous preneed contracts entered into or assumed by the corporation before and after May 1, 2002, the Preneed Act's affective date;

(e) Future ownership and control of Mountain View Memory Gardens & Mausoleum, Inc., is in doubt due to the intent of Jeanette Mince's residual heirs to disclaim any right of succession to ownership of the corporate stock, with the result that the corporation has ceased doing business and has abandoned the Mountain View

Memory Gardens cemetery, thereby placing at serious risk the cemetery property, the validity of preneed contracts for cemetery merchandise and services entered into by consumers, and the consumers' financial investments in those contracts;

(f) Continued operation of its cemetery by Mountain View Memory Gardens & Mausoleum, Inc., will be hazardous to purchasers, beneficiaries, and the people of Alabama, as the term "hazardous" was explained to the Court during the hearing of June 19, 2009, thus authorizing the appointment of a receiver for the business pursuant to ALA. CODE §27-17A-17(b);

(g) Mountain View Memory Gardens & Mausoleum, Inc., is insolvent thus authorizing the appointment of a receiver for its business pursuant to ALA CODE §§27-17A-17(b) and 27-32-6(1); and

(h) Mountain View Memory Gardens & Mausoleum, Inc., appears to have violated the laws of Alabama under circumstances that may be willful, thus authorizing the appointment of a receiver of its business pursuant to ALA CODE §§27-17A-17(b) and 27-32-6(6).

4. The Court determines - and Mountain View Memory Gardens & Mausoleum, Inc., does not contest - that the commonly accepted elements justifying a preliminary Injunction¹ exist in this case: Riding has shown a reasonable chance of success on the merits; absent an injunction, Ridling will suffer immediate and irreparable injury to his abilities to enforce the Alabama Insurance Code in general and the Act in particular, Ridling has no adequate remedy at law (the law, instead, providing for

¹ E.g., *Baldwin County Electric Membership Corp. v. Catrett*, 942 So. 2d 337, 344 (Ala. 2006); *SouthTrust*

receivership); and Mountain View Memory Gardens & Mausoleum, Inc., has, not asserted the existence of a relative hardship from issuance of an injunction that outweighs the benefit to Ridling and the public. The Court further finds that Mountain View Memory Gardens & Mausoleum, Inc., has consented to entry of the injunction requested by Ridling.

it is, therefore, **ORDERED, ADJUDGED, AND DECREED** as follows:

(A) Pursuant to ALA. CODE §§27-17A-17(a) and 27-32-5, Mountain View Memory Gardens & Mausoleum, Inc., and its officers, directors, managers, members, stockholders, agents, employees, and any and all other persons in active concert or participation with it, are hereby **ENJOINED** from taking, removing, concealing, selling, encumbering, lending, damaging, destroying, or otherwise disposing of any and all property, real, personal, and otherwise, owned, leased, or used by Defendant Mountain-View Memory Gardens & Mausoleum, Inc., in connection with the sale of funeral or cemetery merchandise or services as those terms are defined in the Act.

(B) Pursuant to ALA CODE §§27-17A-17(a) and 27-32-5, Mountain View Memory Gardens & Mausoleum, Inc., and its officers, directors, managers, members, stockholders, agents, employees, and any and all other persons in active concert or participation with them, are hereby **ENJOINED** from receiving, collecting, taking, spending, transferring, concealing, lending, or otherwise disposing of any money or funds, whether in the form of cash, checks, debits to accounts, credit cards, lines of credit, loans, letters of credit, extensions of credit, accounts, obligations, debts, credits, proceeds from

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the sale of preneed contracts or other goods or services, or any other form whatsoever owned, claimed, or used by Defendant Mountain View Memory Gardens & Mausoleum, Inc., in connection with the sale of funeral or cemetery merchandise or services as those terms are defined by the Act.

(C) Pursuant to ALA. CODE §§27-17A-17(a) and 27-32-5, Mountain View Memory Gardens & Mausoleum, Inc., and its officers, directors, managers, members, stockholders, agents, employees, and any and all other persons in active concert or participation with them, are hereby ENJOINED from concealing, hiding, transferring, altering, amending, removing, destroying, or otherwise disposing of any and all business and financial information, records, and documents pertaining to, relating to, or reflecting, in any way, the business and financial affairs of Defendant Mountain View Memory Gardens & Mausoleum, Inc., with regard to sales of funeral or cemetery merchandise and services. as those terms are defined in the Act.

(D) Pursuant to ALA CODE §§27-32-1 et seq. and 27-2-53, Denise Azar, Chief of the Receivership Division of the Alabama Department of Insurance, is hereby appointed as Receiver of Mountain View Memory Gardens & Mausoleum, Inc. Azar is directed and is authorized to immediately take possession of the assets of Mountain View Memory Gardens & Mausoleum, Inc., related to the sale of funeral or cemetery merchandise and services, and shall administer those assets under the orders of this Court for the purpose of attempting to dissolve, liquidate, and conserve them. Azar is further authorized to conduct such examination or investigation of the business and financial affairs of Mountain View

Memory Gardens & Mausoleum, Inc., as they relate to the sale of funeral or cemetery merchandise and services, as she deems necessary or appropriate in her discretion. and to report the results of any such examination or investigation to this Court.

(E) As she deems appropriate from time to time in the exercise of her discretion, Azar, as Receiver, is authorized to enter into any agreements on such terms as she considers necessary so as to allow for management, operation, maintenance, and/or preservation of the Mountain View Memory Gardens cemetery until such time as the cemetery has been sold and/or otherwise liquidated in accordance with orders of this Court, provided, however, that this should not be construed as a directive that Azar must necessarily enter into arrangements to keep the cemetery open for business.

(F) As she deems appropriate from time to time in the exercise of her discretion, Azar, as Receiver, is authorized to: (i) impose such restrictions on access to the Mountain View Memory Gardens cemetery property by the general public if deemed necessary for the safety or protection of the cemetery property and/or persons going onto cemetery property, (ii) reach agreements or arrangements with funeral homes or others to the end of facilitating exercise of previously sold and documented interment rights in the cemetery in the regular and ordinary course; and (iii) impose reasonable rules and restrictions concerning use of the cemetery property and access to the property and activities therein on the part of contractors or others for purposes of opening and closing grave sites or mausoleum niches and installing, replacing, maintaining, or repairing monuments, markers, or other installations.

(G) As she deems appropriate from time to time in the exercise of her discretion, Azar, as Receiver, may communicate with buyers or beneficiaries of preneed contracts

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concerning the status of such contracts. To the extent some of such preneed contracts remain in payment mode. Azar may determine whether and to what extent continuing installment payments will be accepted.

(H) Azar may take reasonable steps to identify prospective purchasers of the Mountain View .Memory Gardens cemetery property and may receive purchase proposals, and is further authorized to discuss and negotiate such proposals with the prospective purchasers, provided that an agreement for sale of the property must be presented to and approved by the Court before same is valid.

(I) Pursuant to ALA. CODE §§27-17A-17(a) and 27-32-5, Mountain View Memory Gardens & Mausoleum, Inc., and its officers, directors, managers, members, stockholders, agents, employees, and any and all other persons in active concert or participation with them, are hereby ENJOINED from interfering with, hampering, slowing, obstructing, or otherwise impeding Azar and her deputies, employees, agents, and others acting under her direction or control from discharging their duties and carrying out their responsibilities as Receiver.

(J) Any and all banks, credit unions, brokerage firms, trustees, and any and all financial institutions of any kind, character, or nature whatsoever with which Mountain View Memory Gardens & Mausoleum, Inc., or any officers, directors, managers, members, stockholder, agents, or employees thereof have or have had accounts of any form or type relating to Mountain View Memory Gardens & Mausoleum, Inc. or its business are hereby authorized and directed to provide Azar with any and all information she might request concerning such accounts for any period of time Azar deems necessary. Without limiting

the generality of the foregoing, the following financial institutions are hereby authorized to disclose any information requested by Azar concerning the accounts indicated: Regions Morgan Keegan (Houston, Texas) - trust accounts 44-0273-01-9 and 45-0359-01-3; (and/or successor account numbers 7979010122 and 7979005931); and First Federal Bank (Fort Payne, Alabama) - account 0-02-00-055407.

(K) For purposes of administration, any bank, credit union, brokerage firm, trustees, and any and all financial institutions of any kind, character, or nature whatsoever with which Mountain View Memory Gardens & Mausoleum, Inc., or any officers, directors, managers, members, stockholder, agents, or employees thereof has any existing trust or account containing funds or assets of any nature or description relating to Mountain View Memory Gardens & Mausoleum, Inc., or its business shall abide by the reasonable directives of, and otherwise deal with, Azar, or her designees, as representative of the interests of Mountain View Memory Gardens & Mausoleum, Inc., in connection with any such funds, assets, accounts, or trusts. Without limiting the generality of the foregoing, the following financial institutions are hereby authorized to abide by the reasonable directives of, and otherwise deal with, Azar, or her designees, with respect to the accounts indicated: Regions Morgan Keegan (Houston, Texas) - trust accounts 44-0273-01-9 and 45-0359-01-3 (and/or successor account numbers 7979010122 and 7979005931); and First Federal Bank (Fort Payne, Alabama) - account 0-02-00-055407. Such directives may include, but are not limited to, closing of said accounts and the withdrawal or transfer of the assets or funds therein or any portion thereof as may be instructed by Azar in her discretion.

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(L) Pursuant to ALA CODE §§27-17A-17(a) and 27-32-5, Mountain View Memory Gardens & Mausoleum, Inc., and its officers, directors, managers, members, stock holders, agents, employees, and any and all other persons in active concert or participation with them, are hereby **ENJOINED** from withdrawing funds from, writing checks on, or otherwise spending, transferring, or drawing against funds located in any account for which Mountain View Memory Gardens & Mausoleum, Inc. is shown as owner and/or otherwise appears to have an interest in such account that is connected, in any way, with the sale of funeral or cemetery merchandise or services, or with the endowment care trust, to include but not be limited to file accounts specified in the above paragraphs (J) and (K).

(M) Pursuant to ALA. CODE §§27-17A-17(a) and 27-32-5, Mountain View Memory Gardens & Mausoleum, Inc., and its officers, directors, managers, members, stockholders, agents, employees, and any and all other persons in active concert or participation with them, are hereby **ENJOINED** from drawing on, charging on, charging against, or otherwise utilizing any letter of credit, line of credit, credit account, credit card, or otherwise incurring either short term or long term debt that is, in any way, connected with the sale of funeral or cemetery merchandise or services.

(N) Without limiting the generality of the above, Azar is specifically authorized to use funds currently on deposit in the endowment care trust maintained by Mountain View Memory Gardens & Mausoleum, Inc., at Regions Morgan Keegan (Houston, Texas) [account 45-0359-01-3], whether said funds are designated as principal or interest, to pay reasonable expenses incurred for continuing maintenance of Mountain View Memory Gardens cemetery, to induce (but not be limited to) expenses associated with grass cutting,

weed abatement, and similar landscaping actions, and expenses for reasonable utility services for the cemetery office and cemetery operations, as Azar may deem appropriate in exercise of her discretion.

(O) Without limiting the generality of the above, Azar is authorized to request that the United States Postal Service and private courier or delivery services process mail or deliveries to Mountain View Memory Gardens & Mausoleum, Inc., in accordance with such forwarding or address change orders as Azar may submit in her discretion.

(P) This Court reserves determination of whether to **ENJOIN** all persons and other legal entities, except Ridling and Azar, from making claims or commencing or further prosecuting any actions in law or equity or administrative proceedings except in this Court; from obtaining any preferences, judgments, attachments, or other liens against any of the property, personal or real, of Mountain View Memory Gardens & Mausoleum, Inc.; from commencing or continuing any action in the nature of an attachment, garnishment or execution against any of the property, real or personal, of Mountain View Memory Gardens & Mausoleum, Inc.; or from making any levy, garnishment, or execution against any of the property, real or personal, of Mountain View Memory Gardens & Mausoleum, Inc. pursuant to ALA CODE §§27-17A-17(a) and 27-32-5.

(Q) In accordance with ALA.R.CIV.P. 65(c), this Preliminary Injunction is issued and is effective without the giving of security by Ridling as an officer of the State of Alabama.

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Done this 23rd day of June, 2009.



DAVID A. RAINS, CIRCUIT JUDGE

cc: J. Fairley McDonald, III
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